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In The
Supreme Court of the United States

GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO, AS TRUSTEES FOR GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO TRUST, *et al.*,

Petitioners,

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether § 303(d)(1) of the Clean Water Act ("CWA"), 33 U.S.C. § 1313(d)(1) authorizes the U.S. Environmental Protection Agency ("EPA") to determine whether the imposition of statutorily specified effluent limitations will enable certain waters to achieve federally approved water quality standards and to identify and list those waters that will not, regardless of the source of the pollution.

II. Whether § 303(d) of the CWA authorizes EPA to establish total maximum daily loads for those waters identified on a § 303(d)(1) list.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption of the petition, the Association of Metropolitan Sewerage Agencies ("AMSA") participated in the case below as a defendant-intervenor-appellee, as did fifteen other groups. Those groups are the Pacific Coast Federation of Fishermen's Associations, Golden Gate Fishermen's Association, Sierra Club, Environmental Protection Information Center, Coast Action Group, Friends of the Garcia, California Trout, Klamath Forest Alliance, Mendocino Environmental Center, Willits Environmental Center, California Wilderness Coalition, Friends of the Navarro River, South Fork Mountain Defense Committee, Northcoast Environmental Center, and San Francisco Baykeeper. In addition, two parties participated as plaintiff-intervenor-appellants. Those parties are the American Forest & Paper Association and the California Forestry Association.

RULE 29.6 STATEMENT

The Respondent Association of Metropolitan Sewerage Agencies ("AMSA") has no parent corporation or stock owned by a publicly held company.

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INTRODUCTION

The Association of Metropolitan Sewerage Agencies ("AMSA"), defendant-intervenor-appellee, is a trade association that represents nearly 300 publicly-owned treatment works that serve the majority of the sewered population in the United States. As are other point sources regulated under the CWA and subject to total maximum daily loads ("TMDLs"), AMSA's members are affected significantly if nonpoint sources are not included in the TMDL process established by § 303(d) of the CWA. If nonpoint contributions to water quality impairment are not properly identified, calculated and allocated, point sources may be required to clean up pollution emanating from upstream water segments polluted only by nonpoint sources. 33 U.S.C. § 1313(d). In some cases, a downstream point source facility could never comply with water quality standards if upstream nonpoint sources are not identified and addressed.

The Ninth Circuit held that the U.S. Environmental Protection Agency ("EPA") did not exceed its statutory authority in identifying and establishing TMDLs for the Garcia River in California, even though the river was polluted only by nonpoint sources of pollution. (Pet. App. at 31a). Petitioners seek review of that decision.

In the district court, petitioners originally sought to enjoin EPA from listing or issuing TMDLs for waters that were impaired by (1) a combination of point sources and nonpoint sources, as well as (2) waters that were impaired by nonpoint sources only. In their opening brief, petitioners contended that the listing and TMDL requirements of § 303(d) were "exclusively reserved for point sources" and that § 303(d) "focuses solely on point sources of pollution."

(Pet. App. at 50a). Petitioners modified their position in their reply, arguing that a water body impaired by both point and nonpoint sources should be listed under § 303(d). (Pet. App. at 50a). Petitioners now argue that waters polluted only by nonpoint sources of pollution should not be listed and should not be included in the TMDL program. This position ignores the context and language of § 303(d) and the structure of the CWA, frustrates the Act's objective and goals, and results in a wholly unworkable program for TMDL administrators and for those entities, such as AMSA's members, with CWA regulatory compliance obligations. The Ninth Circuit evaluated the language and structure of § 303(d) and held:

> Nothing in the statutory structure – or purpose – suggests that Congress meant to distinguish, as to § 303(d)(1) lists and TMDLs, between waters with one insignificant point source and substantial nonpoint source pollution and waters with only nonpoint source pollution. Such a distinction would, for no apparent reason, require the states or the EPA to monitor waters to determine whether a point source has been added or removed, and to adjust the § 303(d)(1) list and establish TMDLs accordingly. There is no statutory basis for concluding that Congress intended such an irrational regime. (Pet. App. at 28a).

The court's analysis, and its conclusion that deference to EPA was appropriate to the extent that § 303(d) could be deemed ambiguous, is not in conflict with any relevant decisions of this Court. Accordingly, petitioners have presented no compelling reason for the petition for certiorari to be granted.

ARGUMENT

I. The Language, Structure, Purpose and Legislative History of the CWA Do Not Exclude Nonpoint Sources from the TMDL Program.

The CWA is a comprehensive, water quality statute that authorizes a variety of regulatory and nonregulatory tools and approaches in an effort to achieve a singular objective . . . "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). This objective applies to all waters of the U.S., without limitation, regardless of the source of the water quality impairment. To accomplish this objective, some CWA provisions apply only to point sources of pollution, some apply to nonpoint sources of pollution, and some, like § 303(d), apply to both point sources and nonpoint sources.

The tools forged in the CWA to accomplish its bold objective are multifaceted, establishing federal and state authority, mandatory and discretionary duties, and incentive and enforcement provisions. Some sections address broad, holistic water quality goals, and others prescribe precise regulatory requirements. In many cases, Congress provided different, and even overlapping, approaches and statutory authorities to address water quality problems.

Petitioners erroneously suggest that §§ 208 and 319 of the CWA define the limits of the CWA's nonpoint source authority and limit the application of § 303(d). Nothing in the language of either section addresses § 303(d)(1) listing of impaired waters. Petitioners reason that because nonpoint sources are addressed in these sections, § 303(d) is not applicable to nonpoint source impaired waters. This

position is not consistent with the structure and scope of the CWA. Nonpoint sources are addressed either specifically or by implication in numerous other non-regulatory CWA provisions, including CWA § 304(f) (identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution), § 320(a)(2) (the national estuary program) and § 101(a)(7) (national policy to control nonpoint sources of pollution). *See* 33 U.S.C. § 1314(f), 33 U.S.C. § 1330(a)(2) and 33 U.S.C. § 1251(a)(7). All of these provisions address nonpoint sources, but none purports to be the exclusive remedy for nonpoint source impaired waters. None limits the scope of § 303(d). None of these provisions, including § 303, read individually or together, precludes EPA from listing waters impaired solely by nonpoint sources pursuant to § 303(d)(1).

Given that nonpoint sources are solely responsible for impairment in 54 percent of California's waters, and contribute, along with point sources, to impairment in another 45 percent of the waters of the state (Pet. App. at 34a), it is clear that a variety of CWA provisions must be employed to achieve the CWA's national policy and its objective: controlling nonpoint sources of pollution, and restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. Petitioners' suggestion that only two provisions of the CWA were intended to address this significant water quality challenge is absurd. Failure to address the substantial amount of nonpoint source pollution impairing U.S. water quality through the TMDL program would frustrate the objective, goals and policy of the CWA. Nonpoint sources should not be excluded from the TMDL program.

The CWA does not limit § 303(d)(1) lists to those waters impaired in whole or in part by point sources; it

does, however prescribe a process and an evaluation that should be conducted before determining whether an impaired water body should be listed and a TMDL should be developed. This is a plain and rational reading of the language of the statute, and is consistent with the CWA's overall structure.

When the CWA was enacted in 1972, Congress sought to address point sources with an aggressive federal regulatory program. The focus of the point source regulatory program was on achieving compliance with technology-based requirements, which would apply broadly to all dischargers of a certain type or category. In § 303(d), Congress created an incremental approach for improving water quality. For waters failing to meet water quality standards, states would first consider whether technology-based effluent limitations might enable an impaired water segment to meet standards before initiation of a lengthy and expensive TMDL process. States were to determine where the application of technology-based controls would not bring the waters into compliance. That could be the case if point source dischargers were not permitted, if point source dischargers were not meeting their permit limits, if nonpoint sources were contributing to the pollution such that technology-based point source limits would not remedy the water quality impairment, or if point source dischargers were simply not a part of the problem, *i.e.*, a water body impaired only by nonpoint sources. Then § 303(d) would require that states or EPA could take the next step to consider listing the water under § 303(d)(1) and employing other tools available to them to achieve the goals and objective of the CWA. These other tools might include additional, more stringent water quality-based requirements on point sources. Another approach could be

the identification of nonpoint sources causing the pollution so that states or local governments could take appropriate action to achieve the objective of the Act. That Congress meant to *include* waters impaired by point sources where technological controls had not attained water quality standards – as the legislative history shows – does not prove that it intended to *exclude* nonpoint sources from the TMDL requirements. (Pet. App. at 29) (citations omitted).

Clearly, Congress recognized the serious water quality problems caused by nonpoint source pollution when it enacted the CWA in 1972, stating that nonpoint sources of pollution "are a major contributor to water quality problems." H.R. Rep. No. 92-911, at 106 (1972), *reprinted in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 793 (1973). The House Committee on Public Works further noted that "[i]f our water pollution problems are to be truly solved, we are going to have to vigorously address the problems of nonpoint sources." H.R. Rep. No. 92-911, at 109 (1972), *reprinted in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 796 (1973).

The language of the CWA does not exclude nonpoint sources from being identified under § 303(d)(1) and addressed by federal non-regulatory programs, and by whatever state and local authorities, regulatory or non-regulatory, are available. This reading of § 303(d) is reasonable, logical, and consistent with both the language and the structure of § 303 and the Act as a whole, as well as the legislative history, which encourages stemming the flow of nonpoint source pollution in several CWA contexts.

II. The CWA's TMDL Program Does Not Impose Federal Regulation on Nonpoint Source Pollution, and Does Not Raise a Federalism Issue in this Case.

Petitioners seek certiorari under the specter of federalism, arguing that establishing CWA § 303(d)(1) lists and developing TMDLs amount to regulation of nonpoint sources, a role reserved to the states. Development of a TMDL by EPA is not tantamount to federal land use control, contrary to the assertion in Petitioners' Question 3. EPA neither has nor claims to have authority to regulate nonpoint sources. EPA has the obligation to develop § 303(d)(1) lists and TMDLs for substandard waters when states fail to act. *See* 33 U.S.C. § 1313. The courts below found that § 303(d)(1) listing of waters impaired by nonpoint sources and developing TMDLs for those waters was not tantamount to regulation, and petitioners submit no rational basis for claiming otherwise.

In enacting the CWA, Congress recognized the responsibilities and rights of states to prevent, reduce, and eliminate pollution, but created a significant federal leadership role in virtually all programs established by the CWA. One role was that of regulator of point sources under the CWA's national pollutant discharge elimination system ("NPDES"). *See* 33 U.S.C. § 1342. Under that regulatory program, EPA may override delegated states' proposed permit conditions, and insert its own conditions into state-issued NPDES permits. In addition, EPA may bring a federal enforcement action against point sources like AMSA's members for significant civil and criminal penalties if they fail to obtain or comply with an NPDES permit. As AMSA and other point sources can attest, these are elements of regulation. Creating a list and developing

a TMDL are not. TMDLs are not self-executing and do not impose regulatory requirements on any entity until they are incorporated into a regulatory regime.

If EPA develops a TMDL that includes nonpoint sources, states certainly may incorporate the TMDL into a state permit or other enforceable state mechanism. Such state action may be considered regulation, but merely listing impaired waters pursuant to § 303(d)(1) and developing a TMDL may not. The allocation of roles between EPA and the states is one that Congress clearly established when addressing nonpoint sources under the CWA, and one which is not contravened when EPA lists impaired waters and develops a TMDL, and the state incorporates aspects of the TMDL into its own regulatory programs in order to improve the state's water quality.

III. The Decision Below Does Not Conflict with This Court's Precedents.

Petitioners argue that the court below failed to follow precedents of this Court in its evaluation and interpretation of § 303(d) of the CWA, and that the court improperly deferred to EPA in finding that nonpoint sources should be included in the TMDL program. Petitioners then ignore the lengthy evaluation and analysis of the Ninth Circuit as it parsed the language and structure of § 303(d), and held that, "[b]ased on the language of the contested phrase alone, then, the more sensible conclusion is that the § 303(d)(1) list must contain any waters for which the particular effluent limitations will not be adequate to attain the statute's water quality goals." (Pet. App. at 21a-22a). The Ninth Circuit dissected and examined the statutory context of § 303(d), and thoroughly evaluated the

CWA's statutory scheme as a whole. (*See* Pet. App. at 25a-29a). The court considered the issue from several perspectives, and concluded that including nonpoint sources in the TMDL program was the most reasonable interpretation from the language and structure of § 303(d), that it was the best interpretation when considering the statutory scheme as a whole, and that if there were any ambiguity, deference to EPA would be appropriate under either *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The court then determined that under *United States v. Mead Corp.*, 533 U.S. 218 (2001), the instant case was indeed entitled to *Chevron* deference.

Under *Chevron* deference, it is significant that EPA has consistently maintained its interpretation that nonpoint sources are subject to listing under § 303(d)(1). Petitioners misstate the facts when claiming that EPA did not construe § 303(d)(1) as applicable to waters impaired only by nonpoint sources for two decades after the 1972 legislation was enacted. Although petitioners claim that EPA changed its position in the early 1990s, nothing could be further from the truth. As the district court found, "[a]lthough EPA was exceedingly slow to implement TMDL requirements, EPA has not taken a position in conflict with its construction urged in this case. To the contrary, EPA's first description of the TMDL process in its revised Water Quality Planning & Management Regulations is fully consistent." (Pet. App. at 68a, FN. 17) (citations omitted). The TMDL regulations promulgated by EPA in 1985, after public notice and comment, specifically addressed nonpoint sources as did the 1992 revised regulations.

Moreover, petitioners' interpretation of § 303(d) will lead to absurd and reckless results. Under the approach

propounded by petitioners, a water segment could be polluted by runoff from an upstream forestry or agricultural operation, causing water quality standards to be impaired. The pollution could flow into a downstream segment, causing pollution to exceed standards there, also. Under petitioners' interpretation, if no point sources discharged to either segment, the stream would not be listed under § 303(d)(1). But if a single point source, such as stormwater from a municipal parking lot, discharged into the downstream segment, it would be listed and a TMDL would be established. This would occur even if the most significant water pollution originated upstream and even if the nonpoint operation contributed far more pollution than the stormwater runoff. An absurd result, such as the one petitioners seek, should be avoided. *See United States v. Turkette*, 452 U.S. 576, 580 (1981).

CONCLUSION

Accordingly, AMSA respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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